Douglas Ding Jangan & Ors (suing on behalf of themselves and also as representatives of all the residents of Uma Long Bangan) v Government of Sarawak & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO Q-01–368–09 OF 2014
TENGKU MAIMUN, YAACOB SAM AND ZABARIAH YUSOF JJCA
23 MAY 2018

Native Law and Custom — Land dispute — Native customary rights (NCR) over land — Claim — Allegations that license for plant forest issued without consent and knowledge of claimants — Whether there was trespass — Whether claimant's source of and right to life, livelihood and security threatened and affected

Pusaka FTS Forest Plantation Sdn Bhd ('the fourth defendant') was issued a license for plant forest ('LPF'). This LPF overlapped with a forest timber license issues to Perbadanan Perusahaan Kemajuan Kayu Sarawak. SOP Plantations (Borneo) Sdn Bhd ('the fifth defendant'), on the other hand, was issued with a provisional lease for agricultural purposes. The plaintiffs, natives of Sarawak and Kenyah by race, brought a suit at the High Court on behalf of themselves as representatives of Uma Long Bangan, Sg Belaga, Sarawak. Their claim against the defendants was for individual and communal native customary rights ('NCR') lands together with the forests, streams and rivers ('the NCR land'). The plaintiffs' claim arose out of the LPF and PL, which the plaintiffs contended were issued without their consent and knowledge and had overlapped and encroached on to their NCR land. According to the plaintiffs: (a) their ancestors, the descendants and now the plaintiffs have been occupying and practising their NCR over the NCR land; (b) the fourth defendant wrongfully trespassed onto their NCR land; and (c) their source of and right to life, their livelihood and security was seriously threatened and affected and they will continue to suffer loss and damage. Hence, the plaintiffs initiated a claim against the defendants at the High Court. The High Court dismissed the appellant's claim except for a specific patches of the cleared areas of land. Hence, the present appeal. There was also a cross-appeals by the interveners over lands labelled as Nos 38 and 39 in exh D80.

Held, dismissing the appeal and allowing the cross-appeals:

(1) The evidence led by the plaintiffs was insufficient to establish a claim over the said lands labelled as No 4, 5, 9, 16, 25, 36, 37, 38 and 39 in exh D80 and labelled as No 27 in exh D81. The plaintiffs had not proved that they or their ancestors had cleared those specific areas. Even if the plaintiffs could establish any rights, the rights would have been lost when the

plaintiffs permitted the land to be used by another logging contractor who were not natives (see paras 46 & 51).

(2) The interveners argued that the evidence in support of their case was led through the affidavit filed as the supplementary record of appeal. The supplementary record of the appeal should not be disregarded. It was filed in compliance with the order of the court and ought to be considered. Otherwise, the decision of the earlier panel of the court granting leave to the interveners to intervene and to file supplementary record of appeal would be an exercise in futility (see paras 55–56).

[Bahasa Malaysia summary

Pusaka FTS Forest Plantation Sdn Bhd ('defendan keempat') telah diberi lesen tanaman hutan ('LPF'). LPF ini bertindih dengan pengeluaran lesen kayu hutan kepada Perbadanan Perusahaan Kemajuan Kayu Sarawak. SOP Plantations (Borneo) Sdn Bhd ('defendan kelima'), sebaliknya, diberi pajakan sementara untuk tujuan pertanian. Plaintif-plaintif, pribumi Sarawak dan kaum Kenyah, memulakan guaman di Mahkamah Tinggi atas nama mereka sebagai wakil Uma Long Bangan, Sg Belaga, Sarawak. Tuntutan mereka terhadap defendan-defendan adalah bagi tanah anak negeri, secara individu dan komuniti bersama ('NCR') bersama-sama dengan hutan, sungai dan anak sungai ('tanah NCR'). Tuntutan plaintif-plaintif timbul ekoran LPF dan PL, yang menurut plaintif-plaintif, dikeluarkan tanpa persetujuan dan pengetahuan mereka dan telah bertindih dan menceroboh ke dalam tanah NCR mereka. Menurut plaintif-plaintif: (a) nenek moyang mereka, keturunan nenek moyang mereka dan, kini, plaintif-plaintif telah menduduki dan mengamalkan NCR atas tanah NCR; (b) defendan keempat, secara salah, memasuki tanah NCR mereka; dan (c) sumber dan hak mereka untuk hidup, kehidupan dan keselamatan mereka terancam dan terjejas teruk dan mereka akan terus mengalami kerugian dan kerosakan. Oleh itu, plaintif-plaintif memulakan tuntutan terhadap defendan-defendan di Mahkamah Tinggi. Mahkamah Tinggi menolak tuntutan perayu kecuali untuk satu bahagian spesifik kawasan tanah yang dibersihkan. Oleh itu, rayuan ini. Terdapat juga rayuan balas oleh pencelah-pencelah terhadap tanah yang dilabelkan sebagai No 38 dan 39 dalam eksh D80.

Diputuskan, menolak rayuan dan membenarkan rayuan balas:

(1) Keterangan yang dikemukakan oleh plaintif-plaintif tidak mencukupi untuk menuntut tanah yang dilabelkan sebagai No 4, 5, 9, 16, 25, 36, 37, 38 dan 39 dalam eksh D80 dan dilabel sebagai No 27 dalam eksh D81. Plaintif-plaintif tidak membuktikan bahawa mereka atau nenek moyang mereka telah membersihkan kawasan-kawasan tertentu. Jika pun plaintif-plaintif boleh membuktikan apa-apa hak, hak-hak tersebut telah hilang apabila plaintif-plaintif membenarkan tanah itu digunakan oleh

kontraktor pembalakan lain yang bukan anak negeri (lihat perenggan 46 & 51).

(2) Pencelah-pencelah menghujahkan bahawa keterangan yang menyokong kes mereka dikemukakan melalui afidavit yang difailkan sebagai rekod tambahan rayuan. Rekod tambahan rayuan ini tidak boleh diabaikan. Ia telah difailkan dengan mematuhi perintah mahkamah dan patut dipertimbangkan. Jika tidak, keputusan panel terdahulu yang memberi kebenaran kepada pencelah untuk campur tangan dan memfailkan rekod tambahan rayuan akan menjadi langkah yang sia-sia (lihat perenggan 55–56).]

Notes

For cases on native customary rights (NCR) over land, see 10 *Mallal's Digest* (5th Ed, 2017 Reissue) paras 798–799.

Cases referred to

Bohari bin Jaya & Ors v Naim Land Sdn Bhd & Ors [2016] 4 MLJ 631, CA (refd)

Director of Forest, Sarawak & Anor v TR Sandah ak Tabau & Ors (suing on behalf of themselves and 22 other proprietors, occupiers, holders and claimants of native customary rights ('NCR') land situated at Rumah Sandah and Rumah Lanjang, Ulu Machan Kanowit) and other appeals [2017] 2 MLJ 281; [2017] 3 CLJ 1, FC (folld)

Director of Forests, Sarawak & Anor v Racha ak Urud @ Peter Racha Urud & ors and other appeals [2017] 4 MLJ 42, FC (refd)

Kabushiki Kaisha Ngu v Leisure Farm Corp Sdn Bhd & Ors [2016] 5 MLJ 557, FC (refd)

Litus Jau & Anor v Boustead Pelita Tinjar Sdn Bhd & Ors [2014] 1 MLJ 794; [2014] 1 CLJ 880, CA (refd)

TH Pelita Sadong Sdn Bhd & Anor v TR Nyutan ak Jami & Ors and other appeals [2018] 1 MLJ 77; [2018] 1 CLJ 19, FC (refd)

Legislation referred to

Rules of Court of Appeal 1994 r 5
Forests Ordinance 2015 (Cap 74)
Land Code (Cap 81)
Limitation Ordinance (Cap 49)

Appeal from: Civil Suit No 21–06 of 2010 (BTU) (High Court, Bintulu)

Ronald SL Ong (Izayyeem Azim with him) (Sagau, Raja & Co) for the appellant.
Joseph Chioh Hock Hua (Sarawak State Attorney-General's Chambers) for the first, second and third respondents.
Tan Thiam Teck (George Lo & Partners Advocates) for the fourth respondent.

Gabriel Kok (Khoo & Company Advocates) for the fifth respondent.
Paul Tang Ngu Ong Wee (Tan Yap & Tang Advocates) for the sixth, seventh and eighth respondents.

Tengku Maimun JCA (delivering judgment of the court):

INTRODUCTION

[1] This was an appeal by the appellants/plaintiffs against the decision of the High Court at Bintulu in dismissing the appellants' claim for native customary rights ('NCR') except for the lands labelled as No 4, 5, 9, 16, 25, 36, 37, 38 and 39 in exh D80 and land labelled as No 27 in exh D81. The respondents/defendants cross-appealed against that part of the decision of the High Court in allowing the appellants/plaintiffs' claim for those specific areas of land.

[2] There was also a cross-appeal by MU Kedoh Tajang, Siting Lawai and Avit Jawi acting on behalf of themselves and all the residents of Uma Kahei, Long Mekero, Belaga, Sarawak ('the interveners'). The interveners, who contended that they had acquired NCR over land labelled as No 38 and 39 in exh D80, were made parties pursuant to an order of this court after the trial was completed.

[3] We had unanimously dismissed the appellants/plaintiffs' appeal and had allowed the respondents/defendants' and the interveners' cross-appeals.

[4] We now provide our reasons and for ease of reference, parties will be referred to as they were in the High Court.

BACKGROUND FACTS

[5] On 8 December 1998, Pusaka KTS Forest Plantation Sdn Bhd (the fourth defendant) was issued a License for Planted Forest ('LPF'). This LPF overlapped with Forest Timber License No T/3190 issued to Perbadanan Perusahaan Kemajuan Kayu Sarawak on 13 March 1987 (exh D30). There were two other Forest Timber Licences within the vicinity, namely T/4171 (exh D32) and T/4176 (exh D31) issued to Perbadanan Perusahaan Kemajuan Kayu Sarawak on 13 March 1987 and 25 July 1987 respectively.

[6] SOP Plantations (Borneo) Sdn Bhd (the fifth defendant) was issued with a provisional lease (PL) of Lot 10 Punan Land District (exh D35) of an approximate area of 5,765 hectares. The PL was issued on 17 April 1997 for agriculture purpose.

[7] The LPF to the fourth defendant and the PL to the fifth defendant were issued by the second and the third defendant under the relevant provisions of the Forests Ordinance 2015 and the Land Code (Sarawak Cap 81), respectively.

PROCEEDINGS IN THE HIGH COURT

[8] The plaintiffs, natives of Sarawak and Kenyah by race, brought a suit in the High Court on behalf of themselves as representatives of all residents of Uma Long Bangan, Sg Belaga, Sarawak. Their claim against the defendants was for individual and communal NCR lands together with the forests, streams and rivers thereon at Uma Long Bangan, Sg Belaga ('their NCR land'). The plaintiffs' claim arose out of the LPF and the PL, which the plaintiffs contended were issued without their consent and knowledge, and had overlapped and encroached onto their NCR land.

THE PLAINTIFFS' CASE

[9] The plaintiffs contended that since time immemorial, the plaintiffs' ancestors, their descendants and now the plaintiffs have been occupying and practising their NCR over their NCR land. The particulars of customary practices are:

(a) communal NCR land, known as 'tana' dalleh' in Kenyah dialect;

(b) individual NCR lands, including, but not limited to padi farms, rubber gardens, pepper gardens, orchards, oil palm gardens, cocoa gardens, coffee gardens, tapioca gardens, fruit trees, *jatropha* trees, *enkabang* trees and other trees and plants for the use of the community jointly and/or severally;

(c) preservation of the virgin jungle within the said communal NCR for continuous supply of timber, jungle produce, shelter, livelihood, food, games and medicines for the villagers' use;

(d) the customary practices of foraging, hunting, fishing, camping within the communal area are regularly carried out by the plaintiffs' community;

(e) preserving and conserving the said communal and individual NCR lands as asset and property from their forefathers to nurture and preserve in trust for the benefit of their children and descendants;

(f) the said NCR lands and the forests thereon are not just a source of livelihood for the plaintiffs but also constitute life itself as they are fundamental to their social, cultural and spiritual survival of the plaintiffs; and

(g) the graves of the ancestors, forefathers, relatives and the Kenyah people of Uma Long Bangan are located and found in the said land and therefore the duty and responsibility to respect and protect the land and graves of their ancestors rests on the plaintiffs.

[10] The plaintiffs further contended that about the month of July 2009, the fourth defendant and/or its agents or servants wrongfully trespassed onto the plaintiffs' NCR land from Mudung Aang until Sungai Kupa with bulldozers, lorries, machines and other vehicles and damaged portions of their land, their trees and crops.

[11] As against the fifth defendant, the plaintiffs contended that about the year 2000, the fifth defendant and/or its agents or servants wrongfully trespassed onto their NCR land with the aid of bulldozers, lorries, machines and vehicles and destroyed and damaged some portion of their land including their crops, plants and trees thereon, within the hinterland of Sg Sepakau, Sg Semawat, Sg Panan, Sg Nanyan and part of Sg Pajan.

[12] It was further the plaintiffs' case that in spite of protests and objections, the fourth and the fifth defendants continue with the trespass.

[13] By reason of the aforesaid, the plaintiffs contended that their source of and right to life, their livelihood and security is seriously threatened and affected and that they will continue to suffer loss and damage. Hence, the claim against the defendants for the following reliefs as per para 25 of the statement of claim:

(i) A declaration that they have acquired and/or created individual and or communal NCR over the said land and are still the lawful proprietors of the same;

(ii) A declaration that these rights preclude any one or more of the defendants from acquiring, impairing, abridging or extinguishing the plaintiffs' rights in the said land;

(iii) A declaration that the issue of the said licence and or the said provisional lease in so far as they diminish, impair, abridge or extinguish the plaintiffs' NCR, communal or otherwise over the said land are/is bad in law or null and void;

(iv) ...

(v) An order that the plaintiffs be given vacant possession of the said land forthwith;

(vi) ...

(vii) A prohibitory injunction restraining the 4th or the 5th defendants and/or their servants or agents from trespassing, entering, using, clearing and or occupying the said land;

(viii) A mandatory injunction against the 4th and or the 5th defendant and or their servants or agents to cease operation and remove all structures, equipment and machineries from the said land;

(ix) For general damages;

(x) Exemplary or alternatively aggravated damages;

(xi) ...

(xii) ...

(xiii) ...

[14] Oral evidence was led by Takap Sabuk @ Sevuk ('PW6') on the history of the plaintiffs' occupation of the land and their customary practices.

[15] To show the boundary of their NCR land, the plaintiffs produced maps exhs P27, P28, P29 and D3. The maps P27, 28 and 29 were prepared by Mark Bujang ('PW5') based on a perimeter survey of the claimed NCR land carried out by Yusuf Abdullah @ Sanggung Anak Bungu ('PW3') using a hand-held device. PW3 had no personal knowledge of the perimeter of the land that he surveyed. During the survey, the perimeter and features including the old longhouse sites and graveyards were pointed out to him by one Kulleh Selong who was not called as a witness.

[16] The plaintiffs also led evidence:

(a) that when PW3 carried out the perimeter survey of the land in 2010, he had used the timber roads;

(b) that the first plaintiff, Douglas Ding Jangan ('PW2') was issued a licence BT/4236 (exh D21) to extract belian wood within the timber licence T/3190 (exh D61); and

(c) that PW2 had to apply for permission from Kastima Lumber Sdn Bhd ('Kastima') before the belian licence could be issued to him (exh D20).

THE DEFENDANTS' CASE

[17] The defendants denied the plaintiffs claim and contended that the plaintiffs have not acquired or inherited NCR over land claimed by them. They contended that the land under the LPF and the PL issued to the fourth and the fifth defendants respectively, was state land, free from any NCR or the

plaintiffs' NCR. And that even if the plaintiffs had acquired NCR over the land, the NCR would be excluded or excised from the areas covered by the LPF and the PL.

[18] Evidence led for the defendants showed that in 1997, Penghulu Surat Kuja had applied to the Kementerian Pembangunan Luar Bandar dan Pembangunan Tanah for their alleged NCR land to be developed for oil palm plantation. The application was not successful (exhs D40, D41 and D42). Another application was made by Penghulu Surat Kuja in 2004. This application was not successful as well (exh D46).

[19] Penghulu Surat Kuja (and Dato' Sri Nyipa Bato, who was the Temenggong of the Orang Ulu in Belaga), made another application in 2005. Penghulu Surat Kuja and Temenggong Dato' Sri Nyipa confirmed that the area which they jointly applied for is in fact State land and did not involve 'tanah temuda' or 'NCR Rumah Panjang' (exh D43). The area that was applied for overlapped with the lower portions of the area claimed by the plaintiffs.

[20] The defendants also led evidence to show that the area claimed by the plaintiffs were also claimed by other community, namely Uma Kahei (exhs D44 and D45) and by exhs D40, D46, D3 and P27, there were four versions of the extent of the boundaries as claimed by the plaintiffs.

[21] At the request of the court and the parties, at the end of the trial, Eric Dexter Ridu ('DW1') prepared two maps based on aerial photographs taken in 1951 and 1963–1966 of the areas claimed by the plaintiffs as their NCR land, which DW1 referred to as the area of interest (exhs D80 and D81).

[22] Exhibit D80 showed several patches of land which had been cleared for cultivation within the area of interest in 1951 ie prior to 1 January 1958 (the cut-off point by which a native has to prove the creation of NCR). DW1 labelled these patches of land from 1–39 in D80. DW1 however could not determine whether the cleared areas in D81 were cleared between 1951–1958 or between 1958–1961.

FINDINGS OF THE HIGH COURT

[23] After a full trial, the learned judge made, inter alia, the following findings:

(i) that Batang Belaga and its hinterland have been settled by the Kayan, Kenyah, Lahanan and Penan, and subsequently by the Iban, along or near to the rivers or streams which they used for water and mode of travel years ago;

(ii) that there were doubts on the accuracy of the maps in exhs D3, P27, P28 and P29 produced by the plaintiffs; A

(iii) that the plaintiffs did not adduce any evidence and did not produce any map of individual plots of NCR land claimed or acquired by them

(iv) ie which plot belonged to which plaintiff or which resident of Uma Long Bangan; B

(v) that logging had been carried out within the claimed area some 20 years ago;

(vi) that the plaintiffs were not able to pin point the exact areas and the date of the alleged trespasses by the fourth and the fifth defendants respectively; C

(vii) that on a balance of probabilities, the residents of Uma Long Bangan have created, acquired and/or inherited NCR over some areas of land prior to 1 January 1958; D

(viii) that questions remain as to where exactly, to what extent and whether the NCR still subsisted as at 1 January 1958;

(ix) that based on the maps in exhs D78, D79, D80, D81 and D1, the areas within the LPF and PL were outside the cleared areas of the land claimed by the plaintiffs as their NCR land; E

(x) that based on exhs D80 and D81, there were cultivations and settlements along the rivers and streams shown in the maps, including along the Batang Belaga and its tributaries prior to 1958; F

(xi) that based on D80, except for the patches of areas which had been cleared for cultivation and settlements, in 1951 the area of interest which the plaintiffs have claimed to be their NCR land was covered with virgin jungles; G

(xii) that from exh D81 which was based on photographs taken in 1963, the area of interest which the plaintiffs claimed to be their NCR land was still covered with virgin jungles except the cleared areas; H

(xiii) that in 1951 and 1961, except for the patches of cleared areas, the areas within the area of interest claimed by the plaintiffs were still covered with virgin jungles and they had not acquired NCR over these areas; and

(xiv) that the plaintiffs have acquired NCR over the land labelled as No 4, 5, 9, 16, 25, 36, 37, 38 and 39 in D80 and labelled as 27 in D81 which had been cleared for cultivations and settlements within the area of interest shown in exhs D80 and D81. I

A **[24]** Premised upon the above findings, the plaintiffs' prayers in para 25 of the statement of claim were dismissed except for prayer 25(i) in respect of specific patches of cleared areas set out in para 23(xiii) above.

B **[25]** The learned judge made an order that the exact perimeter and areas of these specific patches of cleared areas are to be confirmed by a ground survey to be jointly carried out by the plaintiffs and the defendants. The plaintiffs and the first, second and third defendants are to pay the costs of the ground survey to be carried out and the application for a title to be issued to Uma Long Bangan in respect to these cleared areas of land. The learned judge held that the C plaintiffs did not acquire and have no NCR over the rest of the land which remained as virgin jungles.

[26] Both the plaintiffs and the defendants were aggrieved by the decision. D The plaintiffs appealed against the dismissal of their NCR claim except for the areas labelled as No 4, 5, 9, 16, 25, 36, 37, 38 and 39 in exh D80 and No 27 in exh D81. The defendants cross-appealed against the order granting the plaintiffs' claim over the specific patches of cleared areas in exhs D80 and D81. The interveners cross-appealed that it is the interveners and/or those whom E they are acting for and represent and not the plaintiffs who have acquired NCR over all the cleared areas labelled as No 38 and 39 in exh D80.

[27] At the outset of the hearing, the plaintiffs raised a preliminary objection on the cross-appeals. The plaintiffs contended that the cross-appeals of the F defendants and the interveners were incompetent on the ground that the reliefs sought by them in their respective notices of cross-appeal can only be taken up by way of notice of appeal under r 5 of the Rules of Court of Appeal 1994.

[28] In this regard, learned counsel for the plaintiff submitted that the G defendants and the interveners, by their notices of cross-appeal, sought to set aside the High Court's decision which the plaintiffs did not appeal against, namely the learned judge's decision that declared that the plaintiffs have acquired and/or created communal NCR over the specific patches of cleared areas labelled as No 4, 5, 9, 16, 25, 36, 37, 38 and 39 in exhibit D80 and the H cleared area labelled as No 27 in exh D81. However, those specific patches of cleared land are not a subject matter of the plaintiffs' instant appeal. Learned counsel for the appellants relied on the case of *Kabushiki Kaisha Ngu v Leisure Farm Corp Sdn Bhd & Ors* [2016] 5 MLJ 557.

I **[29]** Having heard submissions, we disagreed with the plaintiffs that the notices of cross-appeal were incompetent.

[30] The High Court dismissed all the reliefs prayed for by the plaintiffs except for prayer (i) in respect of the specific patches of the cleared areas of land.

The plaintiffs, in a nutshell, were appealing against the partial dismissal of prayer (i) and the total dismissal of prayers (ii)–(xiii).

[31] By notices of cross-appeal, the defendants and the interveners sought to vary the judgment of the High Court. The defendants contended that the plaintiffs have not acquired any NCR over any of the cleared patches of land in exhs D80 and D81 as declared by the High Court. As for the interveners, their notice of cross-appeal contended that the plaintiffs have not acquired any NCR over any part of the cleared areas labelled as No 38 and 39 of exh D80.

[32] The Federal Court in *Kabushiki Kaisha Ngu* stated:

> [31] The Court of Appeal in the present case had rightly applied the principle enunciated in the English case of *Re Cavender's Trusts* (1881) 16 CH D 270 which states that an appeal on a point which does not affect the original appellant cannot be by a cross-appeal. In other words, where the respondent wishes to raise matters which are unconnected with the substance of the appeal by the appellant the respondent must proceed by way of a separate notice of appeal.

[33] Clearly, the notices of cross-appeal by the defendants and the interveners raised matters which affected the plaintiffs and were connected to the substance of the plaintiffs' appeal. We therefore overruled the preliminary objection.

[34] In respect of the appeal, there were two issues for our determination, namely:

(a) whether the learned judge erred in granting the plaintiff's claim over the specific patches of cleared areas in exhs D80 and D81; and

(b) whether the learned judge erred in dismissing the plaintiffs' claim over the balance or the rest of the areas of land within the boundary marked in exhs P27, P28 and P29.

[35] We do not propose to set out in detail the arguments advanced by the respective parties in this grounds of judgment. Suffice to state that for the plaintiffs, it was submitted that the learned judge made no error in granting the plaintiffs' claim for NCR over the specific patches of cleared areas in exhs D80 and D81. Learned counsel submitted that His Lordship had made findings on the plaintiffs' claim and had arrived at the decision upon a critical assessment of the evidence and upon testing it against other evidence on record and against the probabilities of the case. The learned judge had also relied on exhs D80 and D81 in finding for the plaintiffs.

[36] On the balance of the areas claimed, learned counsel submitted that the learned judge fell into error in doubting exhs P27, P28 and P29 and in not

giving weight to the community map and in not recognising the plaintiffs' NCR over the balance of the land which was not cultivated or used for farming and gardening.

[37] In opposing the plaintiffs' appeal and in support of its cross appeal, the fourth defendant argued that the alleged *tana' dalleh* of the plaintiffs comprise of both cleared land and primary jungle. Following the majority decision of the Federal Court in *Director of Forest, Sarawak & Anor v TR Sandah ak Tabau & Ors (suing on behalf of themselves and 22 other proprietors, occupiers, holders and claimants of native customary rights ('NCR') land situated at Rumah Sandah and Rumah Lanjang, Ulu Machan Kanowit) and other appeals* [2017] 2 MLJ 281; [2017] 3 CLJ 1 ('*TR Sandah*'), *tana' dalleh* is not NCR land.

[38] It was also argued for the fourth defendant that the plaintiffs' appeal that relates to the balance of claimed area must fail because the plaintiffs have no NCR over the land claimed in the first place and even if they have, the plaintiffs have lost that right to logging which had taken place pursuant to various timber licences for more than 20 years without any objection or complaint on the part of the plaintiffs.

[39] The crux of the fifth defendant's submission was that the plaintiffs' right cannot prevail over the fifth defendant's indefeasible title to Lot 10 Punan Land District and that the plaintiffs' action against the fifth defendant is time barred under the Sarawak Limitation Ordinance.

[40] For the first to the third defendants, it was submitted that the learned judge should not have granted the plaintiffs' claim for the specific labelled areas in exhs D80 and D81 as the application of Temenggong Nyipa from Uma Kahei for the development of the NCR land at Sg Pih Block 2, Belaga had been approved by the first defendant in 2009 (see exh D45). For the balance of the areas claimed by the plaintiffs, the first to the third defendants likewise submitted that based on the judgment of the Federal Court in *TR Sandah*, the plaintiffs cannot claim for the jungles not cleared for cultivation.

[41] The interveners submitted that the cleared areas labelled as No 38 and 39 in exh D80 is part of Sungai Pih (Block 2 Belaga NCR Development Area). The development had been approved by the first defendant, the Government of Sarawak, to be the NCR development area of Uma Kahei. This fact, according to the interveners, proves that the first defendant had recognised the labelled areas No 38 and 39 to be the NCR of Uma Kahei.

OUR FINDINGS

[42] In respect of the plaintiffs' appeal, we were unanimous in our view that by the decision of the Federal Court in *TR Sandah*, which we were bound to follow, the plaintiffs were not entitled to the balance of the area claimed, being the virgin jungle not cultivated.

[43] In *TR Sandah*, among the questions of law posed for determination by the Federal Court was 'whether the pre-existence of rights under native laws and customs which the common law respects include rights to land in the virgin/primary forests which the natives, like the respondents and their ancestors (who are Iban by race), had not felled or cultivated but were forests which they have reserved for food and forest produce'. The Federal Court, by majority answered the question in the negative.

[44] The plaintiffs' appeal against the dismissal of their NCR claim over areas not cultivated therefore has no merits and was consequently dismissed.

[45] Insofar as the cross-appeals were concerned, we were unable to agree with learned counsel for the plaintiffs that the learned judge had critically evaluated the evidence.

[46] Having perused the records of appeal, we found that the evidence led by the plaintiffs were not sufficient to establish a claim over the said lands labelled as No 4, 5, 9, 16, 25, 36, 37, 38 and 39 in exh D80 and labelled as No 27 in exh D81. The plaintiffs have not proved that they or their ancestors had cleared those specific areas shown in exhs D80 and D81.

[47] It is trite that the burden is always on the plaintiffs to prove their NCR claim. In the instant case, the learned judge doubted the accuracy of the maps produced by the plaintiffs and had instead relied on exhs D80 and D81 prepared by DW1 to find that the plaintiffs have acquired NCR over the specific areas labelled as No 4, 5, 9, 16, 25, 36, 37, 38 and 39 in D80 and labelled as No 27 in D81. This approach was rejected by this court in *Bohari bin Jaya & Ors v Naim Land Sdn Bhd & Ors* [2016] 4 MLJ 631 where Varghese George JCA said at p 645:

> [24] What the plaintiffs appear to be relying upon to identify the claimed NCR land limits was merely the material that had been introduced instead by the defendants in their evidence ...
>
> [25] In our considered view, this 'fall-back' approach that has been taken by the plaintiffs to identify the exact alleged encroached area ought not to be condoned by the courts, that is notwithstanding the application of a flexible approach as judicially encouraged with respect to dealing with NCR claims. If such a latitude was allowed wherein the plaintiffs' required proof of the location was based solely on

A the defendants' evidence, this would, in our assessment, amount to the courts approving a shifting of the burden of proof (which was always upon the plaintiffs), ...

B **[48]** Further, the learned judge acknowledged that the area claimed by the plaintiffs had been settled and cultivated by others, as apparent from the following findings of the learned judge:

> 23. From the evidence adduced, the Batang Belaga and its hinterland have been settled by the Kayan, Kenyah, Lahanan and Penan, and subsequently by the Iban, along or near to rivers or streams which they used for water and mode of travel years ago. These settlements have been documented in the Sarawak *Gazette* in 1882, 1916, 1924, 1936 and 1949 (see exhibits D10, D11, D12, D13, D15, D16, D17, D18 and D19). DW1 had on behalf of 1st, 2nd and 3rd Defendants produced two maps tendered as exhibits D47 and D48 in respect of the areas covered by the PL. These maps showed that some areas of land had been cleared for cultivation inside the PL based on serial photographs taken in 1951 and 1963. The total of these cleared areas in 1951 amounted to 410.2 hectares. These confirmed that there were settlements along and in the hinterland of the Batang Belaga. Therefore NCR would have been created, acquired and or inherited in the Batang Belaga areas by these peoples.

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E **[49]** In the light of the learned judge's express finding that the NCR would have been created, acquired and/or inherited in the Batang Belaga areas by Kayan, Kenyah, Lahanan, Penan and Iban, it cannot be said that the plaintiffs have proved, on a balance of probabilities their NCR claim for the land.

F **[50]** In addition, the learned judge found that logging had taken place for over 20 years. The concept of continuous occupation has always been recognised as an essential feature of NCR to land. In *Director of Forests, Sarawak & Anor v Racha ak Urud @ Peter Racha Urud & ors and other appeals* G [2017] 4 MLJ 42, the respondents claimed that following the grant by the Director of Forests, Sarawak, of timber licences and licences to plant forests to the four appellant companies, the latter had trespassed onto lands over which the respondents had acquired NCR. The Federal Court held that on the facts, the respondents no longer possessed, planted or maintained their NCR lands H in their previous settlements where logging activities by the appellants had been carried out for about 20 years before the commencement of the suit against the appellants. The Federal Court stated that it was inconceivable that the respondents would not have known of the presence of the logging activities on the land for over a period of 26 years had they been in occupation of the land I and that the uncontradicted evidence was inconsistent with 'occupation'.

[51] Similarly in the instant case. Given the finding of fact by the learned judge that logging had been carried out for more than 20 years, even if the plaintiffs could establish any rights, which was not the case, the plaintiffs' right

would have been lost when the plaintiffs permitted the land to be used by Perbadanan Perusahaan Kemajuan Kayu Sarawak, the licensee of Timber Licences No T/3190 and T/4176 and Kastima, the logging contractor who are not natives.

[52] The conduct of PW2 in asking for permission to use Kastima's logging roads within LPF/0013 in relation to the application and renewal of the belian licence is conclusive evidence of the fact that the plaintiffs did not occupy the claimed areas logged by the fourth defendant.

[53] As for the PL issued to the fifth defendant, the law is settled that the rights of the plaintiffs cannot prevail over the indefeasible title of the fifth defendant. In *TH Pelita Sadong Sdn Bhd & Anor v TR Nyutan ak Jami & Ors and other appeals* [2018] 1 MLJ 77; [2018] 1 CLJ 19, Raus Sharif CJ said at p 92 (MLJ); p 35 (CLJ):

> [28] It can be seen that although s 132 of the Sarawak Land Code is not similarly worded as s 340 of the National Land Code ('NLC'), the net legal effect of the indefeasibility accorded to s 340 of the NLC may admit to the same construction as s 132 of the Sarawak Land Code. In the absence of fraud, upon registration of a charge, the party in whose favour the registration has been effected will obtain an indefeasible title to/or interest in the land. This is a given.
>
> ...
>
> [32] We agree that titles should not be issued over land encumbered with NCR unless they have been extinguished; but with respect, we hold the view that, once titles are issued, indefeasibility of title sets in ...
>
> [33] The disputed lands being registered entities accorded protection to the interested parties under the aegis of indefeasibility. The orders made by the trial judge to nullify the provisional lease or to exclude areas claimed by the plaintiff as their NCR, where no fraud has been alleged against the registered owners of the land under the provisional leases or registered charge thereof, thus, would be contrary to the doctrine of indefeasibility of title embodied under s 132 of the Sarawak Land Code ...

[54] The provisional lease was issued to the fifth defendant in April 1997. This action was filed by the plaintiffs 13 years later, in 2010. On the authority of *Litus Jau & Anor v Boustead Pelita Tinjar Sdn Bhd & Ors* [2014] 1 MLJ 794; [2014] 1 CLJ 880, we found that the plaintiffs' claim was time barred. In *Litus Jau*, Raus Sharif PCA (as the CJ then was) said at pp 806–807 (MLJ); p 898 (CLJ):

> [33] The issue now is when the plaintiffs' cause of action accrued. Looking at the facts objectively it is safe to conclude that the plaintiffs' cause of action against the second and third defendants accrued after the issuance of the provisional lease in 1992. Given the scenario and premised on the thirty six months limitation provided under s 2(a) of PAPA, there can be no doubt that the plaintiffs' action against the

second and third defendants is time barred as the suit was brought nearly twenty years after the issuance of the provisional lease which is beyond the statutory timeline permitted.

...

[35] Insofar as the first defendant was concerned, as we have alluded to in the earlier part of this judgment, the limitation period provided for under item 97 of the SLO is six years. In this regard based on item 97 of the SLO, we find that the plaintiffs' action which was instituted in year 2011 nearly eighteen years after the first defendant had finished the oil palm plantation is clearly out of time.

[55] As for the interveners, their position essentially was that they have NCR over the land labelled as No 38 and 39 in exh D80 instead of the plaintiffs. The evidence in support of the interveners' case was led through the affidavit filed as the supplementary record of appeal. This course was taken pursuant to the order of this court in allowing the interveners' application to intervene and to be made a party to this appeal.

[56] In this regard, we were unable to agree with learned counsel for the plaintiffs that the supplementary record of appeal should be disregarded. In our view, the supplementary record of appeal, which was filed in compliance with the order of this court, ought to be considered otherwise the decision of the earlier panel of this court granting leave to the interveners to intervene and to file supplementary record of appeal would be an exercise in futility.

[57] In any event, there was evidence led by Wilfred Jolly ('DW3') that the purported area claimed by the plaintiffs was in fact also claimed by the Uma Kahei community (see exhs D44 and D45). The interveners were acting on behalf of themselves and all the residents of Uma Kahei. The evidence of DW3 thus lent support to the interveners' claim.

CONCLUSION

[58] To conclude, we found insufficient judicial appreciation of the evidence on the part of the learned judge as to warrant our appellate intervention. For the above reasons, we allowed the cross-appeal by the defendants and the interveners respectively with no order as to costs. The order of the High Court was set aside. Consequent thereto, we made the following orders:

(a) for the first to the third defendants, relief was granted as per prayers 1(a) and (b) of the notice of cross-appeal as follows:

1(a) That the Appellants and/or those whom they claim to represent, have not lawfully acquired or have not acquired at all native customary rights over the cleared areas labelled as No. 38 and No. 39 in Exhibit- D80 or any part thereof.

(b) That the Appellants and/or those whom they claim to represent have not lawfully acquired or have not acquired at all native customary rights over the cleared areas labelled as No 9, No 25, No 36 and No 37 in Exhibit D-80 or any part thereof.

(b) for the fourth defendant, we granted relief as per prayer (1)(a) of the cross-appeal as follows:

1(a) That the Appellants and/or those whom they claim to represent have not acquired native customary rights over any part of the cleared areas labelled as No 38 and No 39 in Exhibit D80.

(c) for the fifth defendant, we allowed the relief sought for in the notice of cross-appeal in prayer (a) as follows:

(a)(i) The learned High Court Judge erred when his Lordship ruled that the Appellants/Plaintiffs have acquired native customary rights over the specific patches of areas of land labelled as No. 4, 5, 9, 16, 25, 36, 37, 38 and 39 in Exhibit D80 and labeled as No. 27 in Exhibit D81.

(ii) The learned High Court Judge erred when his Lordship ordered that these specific patches of areas of land abovenamed be confirmed by a joint ground survey, and that a title be issued to Uma Long Bangan in respect of these areas of land.

(d) for the interveners, we allowed the relief as prayed for in prayer (1)(a) and (b) as follows:

1(a) That the Appellants and/or those whom they claim to represent have not acquired native customary rights over any part of the cleared areas labeled as No 38 and No 39 in Exhibit D80.

(b) That the 6th, 7th and 8th Respondents and/or those whom they are acting for and represent have acquired native customary rights over all the cleared areas labeled as No 38 and No 30 in Exhibit D80.

Appeal dismissed and cross-appeals allowed.

Reported by Afiq Mohamad Noor